In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1410

JOSEPH V. AGOSTO,
Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not published, affirming the order of the Board of Immigration Appeals, is set forth at page i of Appendix A, and the order of the Court of Appeals denying petition for rehearing en banc is set forth at page iii of

Appendix A. The opinion of the Board of Immigration Appeals is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1977. A timely petition for rehearing en banc was denied on March 23, 1977, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 8 U.S.C. 1105a(a)(5) requires transfer to a United States District Court for a de novo hearing where the Board of Immigration Appeals, the agency charged with making a final administrative determination of petitioner's immigration status, has found that his evidence is sufficient, if believed, to support his claim to United States citizenship.

STATUTE INVOLVED

Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), provides as follows:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise.

STATEMENT OF THE CASE

Petitioner last arrived in the United States on or about December 11, 1966 and was then admitted upon presentation of a United States passport (R. 349-351).[1] On September 5, 1967, deportation proceedings were commenced against petitioner by issuance of an order to show cause, charging that he was deportable under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an alien who had entered the United States without inspection (R. 349-351). At his initial hearing before a special inquiry officer,[2] petitioner denied that he

[1] ("R.") References are to the certified administrative record, filed in the Court below on June 13, 1975. ("S.R.") References are to the supplemental administrative record filed in the Court below on August 22, 1975. Said record was filed pursuant to Section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

[2] "Special inquiry officers" are now referred to as "immigration judges." 8 C.F.R. 1.1(1). For consistency, the latter term will be used throughout this petition.

was an alien (S.R. 28-31). He contended that he was a United States citizen under the provisions of 8 U.S.C. 1401(a)(1) by virtue of his birth in Cleveland, Ohio (S.R. 34), and that he was therefore not amenable to deportation proceedings. 8 U.S.C. 1251.

The petitioner's claim to citizenship rests primarily upon the testimony of three witnesses, Pietro Pianetti (S.R. 323-363; 444-455), his wife, Crocifissa Pianetti (S.R. 363-391; 511-515), and Carmen Ripolino (S.R. 419-444). The Pianettis affiliated the petitioner in Italy in 1943, and a court order was obtained permitting him to assume their surname (R. 355, 422, 688). Both Mr. and Mrs. Pianetti testified that the petitioner is the natural child of Angelica Porello, Mrs. Pianetti's deceased sister, that he was born in the United States and sent to Italy to live with the Pianettis when he was between two and three years of age. The testimony of Carmen Ripolino, the youngest child of Angelica Porello, corroborated the Pianettis' testimony on several important points.

In support of its charge that the petitioner is an alien subject to deportation, the respondent relied entirely on documents made in Italy many years ago purporting to show that the petitioner was born in Italy (R. 667, 97, 419, 422, S.R. 94-95).

The immigration judge found the testimony of the Pianettis and Carmen Ripolino not to be credible (S.R. 608-610). Accordingly, in his decision dated April 11, 1973, he rejected the petitioner's claim to citizenship, found the petitioner to be a deportable alien, and ordered that he be deported to Italy (S.R.

593-627). After summarizing the evidence, the Board of Immigration Appeals concluded that:

> If believed, the testimony of the Pianettis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage. (R. 4).

Deferring to the immigration judge on the question of credibility, the Board of Immigration Appeals affirmed the decision of the immigration judge on April 4, 1975 (R. 1-8).

On May 3, 1975, a petition for review was filed requesting transfer of the proceedings to the United States District Court for hearing de novo pursuant to 8 U.S.C. 1105a(a)(5). The Court of Appeals, with Judge Hufstedler dissenting, rejected petitioner's request for transfer of the proceedings and affirmed the decision of the Board of Immigration Appeals (Appendix A).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 8 U.S.C. 1105a(a)(5).

Section 1105a(a)(5) of Title 8 provides that a nonfrivolous claim to United States citizenship which presents a "genuine issue of material fact" entitles the claimant to a de novo hearing on the issue of nationality before a United States District Court. Prior to enactment of the statute,[*] this Court held that a claimant to citizenship had a constitutional

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[*] 75 Stat. 651 (1961).

right to a judicial trial on the issue of nationality if the evidence produced at his administrative hearing was sufficient, if believed, to support a finding of citizenship. *Ng Fung Ho v. White,* 259 U.S. 276 (1922); *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149 (1923). This Court's rationale for divesting the executive department of jurisdiction to pass on a colorable claim to citizenship and requiring that such a claim be tried in the district court was the difference in security of judicial over administrative action.

Although this Court has had no occasion to interpret 8 U.S.C. 1105a(a)(5), those courts of appeals that have dealt with the statute have uniformly held that it mandates transfer of the proceedings to a district court where the evidence on the issue of citizenship is conflicting and sufficient evidence, if believed, has been presented by the petitioner to establish his claim. *Pignatello v. Attorney General,* 350 F.2d 719 (2d Cir., 1965); *Tanaka v. INS,* 346 F.2d 438 (2d Cir., 1965); *Maroon v. INS,* 364 F.2d 982 (8th Cir., 1966); *Jolley v. INS,* 441 F.2d 1245 (5th Cir., 1971); *Olvera v. INS,* 504 F.2d 1372 (5th Cir., 1974); *Rassano v. INS,* 377 F.2d 971 (7th Cir., 1967). All of these cases stand for the proposition that transfer under the statute can only be denied where an assertion of citizenship is unsupported or where the facts are undisputed, and considered in the light most favorable to the claimant, fail to support a finding of citizenship. In such an instance, denial of transfer has been equated to a grant of summary judgment for the government.

Reference to the standard set forth in *Kessler v. Strecker,* 307 U.S. 22 (1939), decided prior to enactment of 8 U.S.C. 1105a(a)(5), suggests that the court below perceived its duty under the statute to include weighing the petitioner's evidence, since *Kessler,* by way of dictum, alluded to the requirement that a petitioner "support his claim by *substantial* evidence * * *" 307 U.S. at 35 (emphasis supplied). Further, as the dissent points out, the majority of the panel undertook to determine the credibility of petitioner's evidence, a function clearly not assigned to the courts of appeals by the statute. All other courts of appeals that have interpreted the statute have limited their role to ascertaining whether the evidence produced at the administrative hearing presents a "genuine issue of material fact as to the petitioner's nationality." See *Pignatello v. Attorney General,* supra; *Tanaka v. INS,* supra; *Maroon v. INS,* supra; *Jolley v. INS,* supra; *Olvera v. INS,* supra; *Rassano v. INS,* supra.

The decision of the Board of Immigration Appeals, the agency charged with making a final administrative determination of the petitioner's immigration status, leaves no room for doubt that petitioner's evidence presented genuine issues of material fact. The Board found that:

> If believed, the testimony of the Pianettis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage. (R. 4).

With respect to the issue of credibility, the Board followed the familiar principle of deferring to the

immigration judge, who is in the best position, as the administrative trier of fact, to judge the veracity of petitioner's witnesses (R. 4). Hence, the decision of the court below deprives petitioner of a judicial trial provided by the statute, and sanctions final resolution of his claim to citizenship, where credibility was the determinative factor, to a hearing officer in the executive department.

In a situation virtually identical to that in the present case, in that the determinative factor involved the issue of credibility, the Second Circuit liberally construed the statute as requiring solely the presentation of a nonfrivolous claim to citizenship. Ordering the proceedings transferred to the district court, the Court stated:

> Thus what Section 106(a)(5) requires, as a condition of a *de novo* judicial determination of the claim of citizenship, is nothing more than the claim not be frivolous. Petitioner's claim of citizenship can hardly be classified as frivolous, and the Board of Immigration Appeals in its decision denying a reopening of the deportation proceedings did not take a contrary view. It merely reasoned, quite correctly, that this administrative relief was not a prerequisite to obtaining the judicial determination.
>
> * * *
>
> Petitioner's claim of citizenship involves delicate issues of credibility that could only be resolved with the benefit of live testimony and a more complete documentary record.

Pignatello v. Attorney General, 350 F.2d 719, 723.

Indeed, the decision below marks the Ninth Circuit Court of Appeals as the only court which has denied

transfer under the statute where the administrative decision turned on the question of the credibility of petitioner's witnesses. Other courts have consistently confined their review of the administrative record to determining whether the petitioner had presented evidence, sufficient if believed, to entitle him to a finding of citizenship. In the instant case, the proper scope of review does not go beyond a reading of the decision of the Board of Immigration Appeals, which clearly indicated that petitioner had presented a colorable claim to citizenship. By extension of its review to include weighing the evidence and determining its credibility, the court below has contravened the intention of Congress when it codified the procedure for effectuating the constitutional principle enunciated in *Ng Fung Ho v. White,* supra. Furthermore, its decision is in direct conflict with the decisions of all other courts of appeals that have construed 8 U.S.C. 1105a(a)(5). Said conflict justifies the grant of certiorari to review the judgment below.

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2. THE DECISION BELOW RAISES AN IMPORTANT QUESTION CONCERNING PROCEDURAL RIGHTS TO BE ACCORDED A CLAIMANT TO UNITED STATES CITIZENSHIP.

The decision below, if allowed to stand, would most certainly have a chilling effect on the administration of our immigration laws, since it authorizes the executive department to strip away citizenship without according the claimant his constitutional and statutory rights to a judicial trial. Such a decision flies in the face of the traditional concern courts have displayed in safeguarding the precious right to Amer-

ican citizenship. *United States v. Minker,* 350 U.S. 179 (1956); *Nishikawa v. Dulles,* 356 U.S. 129 (1958).

The decision below deserves review by this Court because of the important question it raises concerning the procedural rights of a claimant to citizenship. We submit that it would be appropriate for this Court to grant certiorari and consider, for the first time, the proper interpretation to be given to 8 U.S.C. 1105a(a)(5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
April 7, 1977.

Respectfully submitted,

ROBERT S. BIXBY,
FALLON, HARGREAVES, BIXBY & MCVEY,
OSCAR B. GOODMAN,
GOODMAN AND SNYDER,
Attorneys for Petitioner.

(Appendices Follow)

Appendices

Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 75-2028

Joseph V. Agosto, Petitioner,

vs.

Immigration and Naturalization Service, Respondent.

[January 24, 1977]

Petition to Review an Order of Deportation Issued by the Board of Immigration Appeals

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MEMORANDUM

Before: HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

Petitioner Joseph V. Agosto seeks review pursuant to 8 U.S.C. § 1105a of an affirmance by the Board of Immigration Appeals of an order for his deportation issued by an immigration judge. He claims that he has presented a "genuine issue of material fact as to [his] nationality" which entitles him to a de novo hearing on this issue in the district court. 8 U.S.C.

§ 1105a(a)(5). The evidence presented to the immigration judge does not disclose a colorable claim to United States nationality; nor does it meet the standard set forth in *Kessler v. Strecker,* 307 U.S. 22, 35 (1939).

AFFIRMED.

HUFSTEDLER, Circuit Judge, dissenting:

If our function in reviewing this record were to determine the credibility of petitioner's evidence, I would agree with my brothers. As a fact finder, I, too, would not have credited the testimony presented by petitioner. I dissent for the sole reason that I do not believe our legally assigned role includes a decision on credibility, and, on that basis, I am unable to say that petitioner's evidence, if believed, would not present a colorable claim to American citizenship.

United States Court of Appeals
for the Ninth Circuit

No. 75-2028

Joseph V. Agosto,	Petitioner,
vs.	
Immigration and Naturalization Service,	Respondent.

[Filed Mar. 23, 1977]

ORDER

Before: HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and stay of mandate, and have voted to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing and stay of mandate, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: March 18, 1977.

Appendix B

(Letterhead of
United States Department of Justice
Board of Immigration Appeals
Washington, D. C. 20530)

Apr. 4, 1975

File: A17 038 159—Seattle

In re: Vincenzo *Pianetti* aka Vincenzo Di Paola or Joseph Vincent Agosto

In Deportation Proceedings

Certification

On Behalf of Respondent: Robert S. Bixby, Esq.
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San Francisco, CA 94111
Robert G. Karr, Esq.
9615 Bridgeport Way, S.W.
Tacoma, Washington 98402

On Behalf of I&N Service: David L. Milhollan
Appellate Trial Attorney

Oral Argument: October 30, 1973

Charges:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Entry without inspection

Lodged: Sec. 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1))—Excludable at entry, convicted of a crime involving moral turpitude

Application: Termination, adjustment of status under section 245, suspension of deportation under section 244(a), waiver of inadmissibility under section 212(h), voluntary departure

In a decision dated April 11, 1973, the immigration judge ordered the respondent deported to Italy, but certified his decision to us pursuant to our order of July 12, 1971. The immigration judge's decision will be affirmed.

ALIENAGE

The fundamental issue in this case concerns the respondent's citizenship. The Service alleges that the respondent was born of unknown parents in Italy, that he was placed in a foundling home, and that shortly thereafter he was entrusted to the care of a childless couple who subsequently "affiliated" him under Italian law. The respondent, however, claims that he was born in the United States in 1924, and that his natural mother sent him to Italy at age two or three where he resided with relatives during his youth.

The Service's case is largely documentary in nature. Counsel attacks that case, contending that most of the Italian records showing the respondent to have been born in Italy in 1927 are themselves founded on one erroneous record, which was "created" in an effort to conceal certain aspects of the respondent's birth.

We find, however, that the Service's case is predicated on three records made approximately at the time of the respondent's birth. These three records appear to have been made separately and to have involved various persons who would have been able to determine whether they were dealing with a newborn infant or with a child of two or three years.

Exhibit 64 is a copy of an entry in the Registry of Births for the City of Agrigento, Italy, for the year

1927. It indicates that the respondent was born on July 17, 1927, of a woman who did not wish to be named, and that he was sent to a foundling home in the custody of the person who declared his birth before the registrar. See also Exhibit 4.

Exhibit 65 is a recitation of an annotation which appears in the records of a foundling home located in the same city of Agrigento. That record indicates that the respondent may have been born on July 16 and not July 17, 1927. However, the record does show that he was placed in the foundling home and subsequently entrusted to the woman who later affiliated him.

Exhibit 22 is a recitation from the records of that foundling home indicating that the respondent was baptized on July 18, 1927, two days after his actual birth and one day after the date on which the Civil Registry of Agrigento shows him to have been born.

The respondent concedes that these as well as other Italian records relate to him. He asserts, however, that these records were "created" by his influential maternal grandfather in an effort to conceal the fact that one of the grandfather's daughters had given birth to an illegitimate child in the United States.

The respondent produced three witnesses other than himself who testified in direct support of his claim to United States citizenship. The testimony of the persons who affiliated him in Italy directly contradicts the accuracy of the Service's documentary case, and the assertions of the respondent's alleged half brother comport with the respondent's view of his birth.

Mr. and Mrs. Pianetti affiliated the respondent in Italy in either 1943 or 1944 (see Ex. 31). They both testified several times during the course of the hearing. The translated Italian documents in the record indicate that Mrs. Pianetti is the woman who took the respondent from the foundling home less than two months after his birth. She, however, categorically denied any such occurrence, and asserted that the respondent was the natural child of her sister and was born in the United States.

Her husband, Mr. Pietro Pianetti, confirmed this account, and testified that he and the respondent's maternal grandfather journeyed to Palermo, Italy, in 1927 to meet the respondent who was then arriving by ship from the United States. The respondent was supposed to have been between the ages of two and three years upon his arrival in Italy.

The respondent has been unable to present any official or unofficial documentary evidence in support of his claimed birth in the United States. He did, however, produce a United States citizen witness whose mother appears to have been the same person the respondent claims was his natural mother.

This witness, Carmen Ripolino, testified that he was born in September of 1925, and that he was raised with a brother who was born in August of 1923. The witness asserted that his mother, who died in 1937, had informed him that she had had a third son born in the United States, but who had been sent to Italy at an early age.

If believed, the testimony of the Pianettis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the respondent's alienage. The immigration judge, however, found the Pianettis not to be credible witnesses, and he concluded that they were coached as to their testimony (immigration judge's opinion pp. 17-18).

The immigration judge was in the best postion to judge the veracity of these witnesses, who have close personal relationships to the respondent. Counsel for the respondent accurately asserts that the immigration judge's opinion does not fully reflect the potential import of the testimony of Carmen Ripolino, and that the immigration judge evidently misread part of the testimony of Mr. and Mr. Pianetti. However, we cannot agree with counsel in his contention that the immigration judge failed to comprehend the changes in the respondent's claimed date of birth. Rather, in his decision the immigration judge appears to have attempted to confront all the various claims made by the respondent during the course of these proceedings (see immigration judge's opinion p. 2). Our review of the record convinces us that the immigration judge was correct, and that no error has resulted from the immigration judge's apparent misreading of certain testimony.

It is not beyond the realm of possibility that the respondent's claim to United States citizenship is legitimate. However, in order for us to accept the respondent's version of his birth, as presented by the witnesses he produced and as indicated by the other

evidence of record, we would be required to find: (1) that the respondent's natural father was Salvatore Agosto (Tr. pp. 305, 340); (2) that Salvatore Agosto fathered a child born in 1921 in Cleveland, Ohio, whose name was Joseph, or Giuseppe, Agosto (Exs. 2 & 3), but that this child was *not* the respondent; (3) that the respondent's mother gave birth to a son in Akron, Ohio, in August of 1923 (Tr. p. 392), and that the father of this child was Giacomo Ripolino and not the father of the respondent (Tr. p. 395); (4) that the respondent's mother next gave birth to the respondent in August of 1924, one year later, in Cleveland, Ohio (Tr. p. 514); (5) that she knew the father of the respondent to be Salvatore Agosto (see Tr. 305, 340) and named the respondent Joseph or Joe Agosto, the same name that was given to an earlier child of the respondent's father (Tr. p. 482); (6) that the respondent's mother again began living in the same household as Giacomo Ripolino, and gave birth to a third son in Akron, Ohio, another year later in September of 1925 (Exs. 60 & 61; Tr. p. 399); (7) that the respondent's mother had him baptized in the United States (Tr. pp. 355-57); (8) that the respondent, who can afford to send an investigator to Italy to search records (Tr. pp. 425-26), has not been able to produce a certificate of his United States baptism, even though he ostensibly knows the name under which he would have been baptized and the general vicinity of Ohio in which the baptism likely would have occurred.

Furthermore, the only direct evidence in support of the respondent's position comes from persons with

family ties to the respondent. There is not only a conspicuous absence of documentary support for the respondent's claim, but also an absence of evidence from disinterested persons.

Counsel for the respondent relies on the respondent's Italian marriage in 1944 to a 23-year-old schoolteacher as further evidence that the respondent could not have been born in July of 1927. Counsel argues that it is quite unlikely that a 23-year-old woman would marry a 17-year-old boy given the strict standards then prevailing in a small Roman Catholic community in Italy. Counsel, however, ignores the respondent's sworn pleading in a declaratory judgment action in the state of Washington in which the respondent sought to have his present marriage declared valid (see Ex. 44). The schoolteacher had evidently been tutoring the respondent and had become pregnant, thus necessitating the marriage.

During the course of this proceeding, the respondent has demonstrated considerable flexibility in adapting his story to the Service's proof. His date of birth, as he has alleged or as has been alleged by his witnesses, has fluctuated from 1921 (Tr. pp. 11, 68), to 1925 (Tr. pp. 295, 343), to 1924 (Tr. pp. 483, 514). Nevertheless, in his court action seeking a declaration as to the validity of his present marriage, he was quite willing to let the court believe him to have been 17 at the time of his marriage in Italy (see Exs. 43 & 44). This court action was undertaken at a time when the respondent was making a substantially different claim before the immigration judge.

We find that the Service's case as to alienage is clear, convincing and unequivocal. The respondent is an alien, born in Italy in July of 1927. He is properly the subject of this deportation proceeding.

DEPORTABILITY

The immigration judge found the respondent deportable as an alien who had entered without inspection, and as an alien who was excludable at entry for having been convicted of crimes involving moral turpitude. On appeal, counsel does not challenge these findings, except as to the underlying fact of alienage.

We have decided the question of alienage against the respondent. Furthermore, our review of the record convinces us that the immigration judge was correct in his conclusions with respect to deportability.

RELIEF FROM DEPORTATION

During the course of the proceedings below, the respondent sought various forms of relief from deportation, all of which were denied by the immigration judge. On appeal, the respondent only contests the immigration judge's rulings as to relief under section 245, section 244(a), and section 244(e).

The immigration judge found that the respondent had entered the United States under a willfully false claim to United States citizenship. The immigration judge therefore concluded that the respondent was statutorily ineligible for adjustment of status because

the respondent had not been "inspected and admitted or paroled" into the United States within the purview of section 245. The respondent contends that his claim to citizenship has always been asserted in good faith. He thus argues that he was "inspected" within the contemplation of section 245.

The respondent's claim to eligibility for relief under section 245 is predicated on his having believed the version of his birth which he presented during these proceedings. Such a good faith belief in major part depends on his having been told this version as a youth in Italy by the persons who "affiliated" him. This story, however, is so extraordinary that we have great difficulty believing that it would have been invented and told to an adolescent as the truth, when in fact it was not the truth. We have found the story to be a fabrication, and we also conclude that it was never told to the respondent during his youth. The respondent entered the United States under a knowingly false claim to citizenship, and he is statutorily ineligible for adjustment of status.

We also agree with the immigration judge's conclusion with respect to the respondent's applications for suspension of deportation and for voluntary departure. In order to be statutorily eligible for either form of relief, the respondent must establish that he has been a person of good moral character within the period prescribed for each type of relief. The respondent, however, knowingly gave false testimony before the immigration judge; his claim to citizenship has been knowingly false since its inception. He is

thus statutorily precluded from establishing the requisite good moral character by virtue of section 101(f)(6) of the Act.

The decision of the immigration judge was correct.

ORDER: The decision of the immigration judge is affirmed.

.....

Acting Chairman

Chairman David L. Milhollan abstained from consideration of this case.